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IN THE

Supreme Court of the United States

October Term, 1956

No. 852.

ADRIAN SCOTT,

Petitioner,

vs.

RKO RADIO PICTURES, a corporation,

Respondent.

ANSWER AND BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

Preliminary Statement.

1. This is the third and last of a series of connected cases arising out of the same facts and in which the controlling questions of fact and law were substantially identical. In each of the previous two, a petition for certiorari filed by the plaintiff was denied. [*Loew's Inc. v. Cole,* 9 Cir., 185 F. 2d 641, cert. den. *sub nom. Cole v. Loew's Inc.,* 340 U. S. 954; *Twentieth Century-Fox Film Corp. v. Lardner,* 9 Cir., 216 F. 2d 844, cert. den. *sub nom. Lardner v. Twentieth Century-Fox Film Corp.,* 348 U. S. 944.[1]] Presumably the considerations going to merits,

[1]The instant case and *Lardner,* in fact, were tried together, but separately appealed. [R. (II) 203.]

The Roman numeral in references to the transcript of record indicates the volume in question. For some reason, pagination of volumes I and II commences with page 1 in each volume. Volumes III and IV follow consecutively after volume II.

importance and substantiality, which prompted denial of certiorari in those cases, are equally applicable here.[2]

2. This is a diversity case, commenced in the state court and removed to the District Court. [R. (I) 3, 12-16.] The basic and controlling question relates to whether conduct by the petitioner, found to have been criminal in nature and to have brought him into public disrepute, justified his discharge from a private employment under a contract by which he agreed not to engage in conduct of that sort. This is plainly a question of local law. [*Black v. Cutter Laboratories,* 351 U. S. 292.] There is no federal question involved or sought to be raised.

Question Presented.

The Court of Appeals did not set aside any verdict of the jury, as petitioner's statement of the question misleadingly intimates.[3] [Pet. 2.] The Court of Appeals affirmed a judgment of the District Court entered after a trial by the Court without a jury. [R. (I) 57; Pet., Appendix C, 29.] That judgment was based upon find-

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[2]Contrary to petitioner's implied suggestion [Pet. 7], opposition to the petition for certiorari in *Lardner* was not limited to the claimed lack of finality in the judgment there involved. That opposition was also grounded on the propositions that, on the question of moral turpitude, there was no conflict with *Sinclair v. United States,* 279 U. S. 263; that the judgment correctly applied the law of California to a question which was necessarily controlled by local law; and that the question presented was not of pressing public importance. [See, *Brief in Opposition to Petition for Writ of Certiorari,* Oct. Term 1954, No. 520, pp. 7-13.]

[3]There were two trials in the case. The first one, consolidated for trial with the *Lardner* case, was before a jury. [R. (II) 203.] A verdict favorable to petitioner was set aside on respondent's motion for a new trial. [R. (I) 38, 46.] At the second trial a jury was expressly waived by the parties. [R. (I) 47-48.]

ings of fact to the general effect that petitioner's conduct, individually and in concert with others, at and in connection with a widely publicized hearing of the Committee on Un-American Activities of the House of Representatives, had violated his express contractual commitment to respondent fixing standards in respect of his public conduct; that he had also violated an implied covenant not to do anything which would prejudice or injure his employer; and that these violations of his contract justified his discharge.[4] [R. (I) 50-56.] The Court of Appeals concurred in those findings and in the conclusion drawn therefrom. [Pet., Appendix C, 28.] Thus it is clear that the question posed in the petition is not involved and is not fairly inherent in the record here.

Statement of the Case.

To the statement made by petitioner [Pet. 2-7] the following matters should be added.

1. The Committee hearings at which petitioner appeared were held to investigate alleged infiltration of Communists into the motion picture industry. The intention to hold the hearings, the hearings themselves, the testimony given, and the conduct and activities of the various witnesses appearing, were extensively reported and publicized throughout the nation and in all of the media of public information. They aroused and sustained great public interest, concern and comment throughout the country. [R. (I) 51-52 (Find. VI).]

2. The expressed attitude of the motion picture industry, including petitioner's employer, toward these hearings was that there had been no Communistic in-

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[4]A more detailed statement of the relevant facts in this connection appears, *post*, in our Statement of the Case.

filtration of the industry or any Communist propaganda in its motion pictures; that the Committee's procedure ought to be improved; but that the industry would cooperate with the Committee to bring out the full facts. This attitude was itself widely publicized. [R. (I) 52 (Find. VII).]

3. Petitioner and a number of other persons connected with the industry agreed together as to how they would conduct themselves before the Committee. Ten of these persons, including petitioner, were called as witnesses and each of them was asked whether he was or ever had been a member of the Communist Party. Each of them refused to answer that question. [R. (I) 53 (Find. VIII).] That refusal was not placed on the ground that the answer might tend to incriminate the witness.[5] [R. (II) 270-348.] Each of the witnesses also prepared and distributed to the press a statement vigorously attacking the Committee, its motives and its procedures. [R. (II) 348-392.]

4. From substantial evidence, which it is unnecessary to detail, the District Court found that the conduct of petitioner, individually and in concert with these other witnesses was had without due regard, and was contrary, to public conventions and morals; that it tended to and did bring him into public disrepute, contempt, scorn and ridicule; that it tended to and did shock, insult and offend

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[5]There is not, and never has been, any question in this case of the effect of respondent's acts on petitioner's self-incrimination privilege under the Fifth Amendment. This circumstance, among others, distinguishes the case from *Wilson v. Loew's Inc.*, Oct. Term 1956, No. 552, to which petitioner refers. [Pet. 14.]

the community and public morals and decency; that it tended to and did prejudice respondent and the motion picture industry in general; and that it tended to and did cause a large part of the public to believe that petitioner and those with whom he acted in concert were in fact communists and that communists had infiltrated the motion picture industry, and also to believe that the expressed attitude of the industry toward the Congressional investigation was not held in good faith, but, rather, that the industry, including respondent, was shielding and harboring communists. [R. (I) 54-55 (Find. XI).]

5. From the facts so found it was concluded that petitioner had violated the express, as well as the implied, conditions of his employment contract by engaging in conduct of a type in which he had agreed he would not engage; and that accordingly his discharge was justified. [R. (I) 55-56.]

6. The findings and conclusions to which we have referred were made by the District Judge upon the second trial of the cause, at which a jury had been waived. [R. (I) 47-49.] The jury verdicts in petitioner's favor rendered at the first trial had been theretofore set aside, on motion for a new trial, as "contrary to the great weight of the evidence" and as "a miscarriage of justice" if permitted to stand.[6] [R. (I) 46.]

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[6]Unquestionably, it was fully within the power of the District Judge to make such an order; and his action in so doing is not reviewable. [F. R. C. P., rule 59; *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 247-248; *Portman v. American Home Products Corp.*, 2 Cir., 201 F. 2d 847, 848.]

ARGUMENT.

I.

There Is No Conflict Between the Decision at Bar and Slochower v. Board of Education, 350 U. S. 551. In Fact, There Is No Question Whatever at Bar, as There Was in Slochower, Involving Either the Self-incrimination Privilege or the Requirements of Due Process in Respect of Discharge From Public Employment.

First: Nothing in the decision of this cause below conflicts with *Slochower v. Board of Education,* 350 U. S. 551. The question in that case was whether due process was denied to public employees who claim the self-incrimination privilege by a statute which, as construed by the state court, provided for their automatic removal from office without "right to charges, notice, hearing, or opportunity to explain." The decision was that it did.[7] In arriving at that result it was said, in the majority opinion, that "we must condemn the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment . . ." Accordingly, it was held, invocation of the privilege could not be made the basis of what was virtually a conclusive presumption of guilt, upon the strength of which a state agency could summarily remove one from a position in which he was entitled to tenure terminable only for cause and upon notice. [350 U. S. at 554, 557-558.]

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[7]When such a statute provides appropriate procedural safeguards, discharge, even from public employment, may constitutionally follow. [See, *Adler v. Board of Education,* 342 U. S. 485.]

No such question is involved at bar. The case here arises from private not public employment. It involves only the rights of the parties under their employment contract. The question precipitated by that contract was whether petitioner engaged in conduct proscribed by it. That conduct was not the mere refusal to answer a question put to the employee by the Committee; it was conduct which, in the circumstances of its commission, constituted a *crime* of which he was duly convicted. [R. (I) 128-131.] Conduct of that sort is manifestly contrary to "public conventions and morals." Since the employee had agreed not to engage in conduct contrary to public conventions and morals, he had violated his agreement. That was all that was held below.

Furthermore, no right under the Fifth Amendment was claimed or exercised by petitioner. Consequently, no imputation of any "sinister meaning" was or could have been made below.

Second: The activities of petitioner with which we are concerned here produced the public reactions—*i.e.,* public scorn, contempt, disrepute etc. [see *Statement of the Case,* par. 4, *supra*]—upon the occurrence of which as the result of petitioner's activities his employer was also entitled, under the contract, to discharge him. [R. (II) 116, par. 16, also quoted at Pet. 3.] Of course, a great deal of that public reaction may have been produced by petitioner's refusal to answer the Committee's question concerning his membership in the Communist Party. But the "sinister" inference which the *public* may and does

draw from such a refusal is quite a different matter, as was the case in *Slochower,* from permitting a judicial or other official agency of a state to draw it irrebuttably and without giving the actor an opportunity to be heard and explain. At bar, it was the *fact* of public attitude, not the correctness of that attitude or the process by which it was reached, that was relevant and material to the question whether petitioner had breached his contract.

It cannot well be denied that the American public looks with at least scorn and contempt upon those it believes to be Communists.[8] As Judge L. Hand observed not too long ago, it is undoubtedly true that in America a heated public feeling against Communists exists "among many persons—probably a large majority . . ." [*United States v. Dennis,* 2 Cir., 183 F. 2d 201, 226, *affirmed* 341 U. S. 494.] Nor can it be gainsaid that in the popular mind refusal to deny Communist membership, when an inquiry to that end is made, is tantamount to an admission of the fact.[9] Just the other day the President of the United States gave striking evidence of the popular tendency in this regard when he said at his press con-

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[8]It is everywhere held libelous *per se* falsely to publish of one that he is a communist. [For example: *Spanel v. Pegler,* 7 Cir., 160 F. 2d 619, 622; *Grant v. Reader's Digest Assn.,* 2 Cir., 151 F. 2d 733, 734-735, *cert. den.* 326 U. S. 797; *Mencher v. Chesley,* 297 N. Y. 94, 100-101, 75 N. E. 2d 259-260; *Gallagher v. Chavalas,* 48 Cal. App. 2d 52, 57, 119 P. 2d 408, 412.] Decisions such as these can only rest on the premise that the court knows judicially that so to characterize a man brings him into public scorn, contempt, ridicule or obloquy.

[9]In California, a jury or a court may properly draw an adverse inference from the refusal of a witness, even on ground of self-incrimination, to answer a pertinent question. [*People v. Walsh,* 47 Cal. 2d ....., 47 Adv. Cal. 29, 36, 301 P. 2d 247, 252; *Frost v. Wotton,* 3 Cal. 2d 384, 393, 395, 44 P. 2d 350, 354-355; *Spath v. Seager,* 39 Cal. App. 2d 10, 14, 102 P. 2d 352; *Nelson v. Southern Pac. Co.,* 8 Cal. 2d 648, 654-655, 67 P. 2d 682, 685.]

ference, "that I probably share the common reaction if a man has to go to the Fifth Amendment, there must be something he doesn't want to tell . . ." [*New York Times,* March 28, 1957, p. 16, col. 1; *Ibid.*, p. 13, col. 3.]

This Court, too, only a couple of weeks before *Slochower* was decided, recognized that the self-incrimination privilege does not protect one from "the general public opprobrium" which may be generated by resorting to it. [*Ullman v. United States,* 350 U. S. 422, 430-431.] To this, the dissenting justices added the comments that such disrepute as may follow from invocation of the privilege "is the price he pays for exercising the right of silence granted by the Fifth Amendment . . ."; and that "public opinion casts a person into the outer darkness, as happens today when a person is exposed as a Communist . . ." [*Ullman v. United States, supra,* 350 U. S. at 454, per Douglas and Black, J., dissenting.]

Third: In short, the "sinister" inference to which *Slochower* has reference was not drawn here by either court below or by any other state agency. Those courts, in this connection, found only the existence of two facts—the fact that petitioner's conduct had brought him into public disrepute; and the fact that his conduct, being criminal in nature, had transgressed public conventions and morals. Either of these facts compelled the conclusion that petitioner had violated his contract and so had been justifiably discharged.[10]

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[10]We repeat, that actually there is no Fifth Amendment question here at all. Petitioner did not at any time claim his self-incrimination privilege. [Note 5, *supra.*]

II.

The Decision at Bar Does Not Conflict With Sinclair v. United States, 279 U. S. 263. Nor Does It Deal With the Question Whether Moral Turpitude Is an Element of the Crime Considered in That Case.

First: Sinclair v. United States, supra, 279 U. S. 263, does not conflict with anything decided at bar.[11] There it was held that it is not an essential element of the crime defined in 2 U. S. C. A., sec. 192 (of which petitioner was convicted [R. (I) 128-131]) that there be moral turpitude; the gist of the offense is the refusal to answer pertinent questions. What was held in the instant case was merely that commission of this crime by petitioner was conduct which, on his part, was without regard and contrary to public conventions and morals within the meaning of the contract in suit.

In arriving at that result the Court of Appeals followed its earlier decision in *Twentieth Century-Fox Film Corp. v. Lardner, supra,* 216 F. 2d 844. There the Court had held that commission of the same crime by Lardner violated his agreement not to conduct himself in a manner offending against public decency and morality. It was also held, in *Lardner,* that, *in the particular circumstances of the commission of the crime there,* moral turpitude was involved in fact, although, of course, moral turpitude

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[11] *United States v. Murdock,* 290 U. S. 389, and *Barsky v. Board of Regents,* 347 U. S. 442, are cited by petitioner, apparently only for their express or implied approval of the holding in *Sinclair.* They do not, therefore, require any separate consideration.

need not have existed to have warranted his conviction.[12] [Pet., Appendix B, 9, 11-13.]

The discussion in *Lardner* concerning moral turpitude was made necessary because the contract there expressly proscribed commission of "an offense involving moral turpitude . . ." That is not so in the contract with which we are now concerned. The comparable provision here is conduct contrary to public convention and morals. [R. (II) 116, par. 16.] Consequently, at bar the Court of Appeals did not discuss any question of moral turpitude; and the result which it reached was not made dependent upon that phase of the argument.

If the Court had done so at bar it would have been right, just as it was in *Lardner*. It would have been right because the Court was concerned, in a diversity case, with the meaning of a California contract. It had, therefore, to apply the law of California. [*Erie R. Co. v. Tompkins*, 304 U. S. 64.] It is well established in that state that even though moral turpitude is not an essential ingredient of a crime, the circumstances surrounding its commission may nevertheless import that element. Consequently, when some right or privilege is conditioned upon abstention from commission of a "crime involving moral turpitude" the condition is broken when moral tur-

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[12]One of the reasons urged in *Lardner* for granting certiorari was, as it is here, this supposed conflict with *Sinclair*. [*Lardner v. Twentieth Century-Fox Film Corp.*, Oct. Term 1954, No. 520, Pet. 6-7.] The opposition made the same differentiation which we are making now. [*Ibid., Brief in Opposition to Petition for Writ of Certiorari*, 8-10.] As has been noted, certiorari was denied.

pitude appears from the circumstances of its commission, even though as such it is not an element of the crime itself.[13] [*In re Hallinan,* 43 Cal. 2d 243, 250, 253-254, 272 P. 2d 768, 771-775; *Lorenz v. Board of Medical Examiners,* 46 Cal. 2d 684, 687, 298 P. 2d 537, 539; *In re Hatch,* 10 Cal. 2d 147, 149-150, 152-153, 73 P. 2d 885, 886, 887-888; *In re Richardson,* 15 Cal. 2d 536, 540-541, 102 P. 2d 1076, 1078-1079; *In re Rothrock,* 16 Cal. 2d 449, 455, 106 P. 2d 907, 910-911.] The Court of Appeals, in *Lardner,* was applying this rule of California law, as is shown by its express declaration to that effect and by its citation of *In re Hallinan, supra,* 43 Cal. 2d 243, 272 P. 2d 768. [Pet., Appendix B. 11-13.]

Second: Petitioner dogmatically asserts, without citation of authority, that in the absence of a "statutory or judicial declaration by a state, a United States Court does not have the power in a diversity case to declare public morals in the face of a contrary declaration by a jury." [Pet. 9.] That contention is readily answered.

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[13]A typical example is *In re Hallinan,* 43 Cal. 2d 243, 272 P. 2d 768. There an attorney had been convicted of income tax evasion. At the time, a California statute required disbarment of an attorney convicted "of a crime involving moral turpitude." [Cal. Stats., 1941, c. 1183, sec. 1, p. 2942.] The Supreme Court held that moral turpitude, *i.e.*, a specific evil or fraudulent intent, was not an essential element of the crime of which Hallinan had been convicted; but that it may have involved that element in the circumstances of its commission. Accordingly, the matter was referred for hearing on that issue. Later, the reference having resulted in a finding that moral turpitude had been involved in fact, Hallinan was suspended from practice. [*In re Hallinan,* 48 Cal. 2d ....., 48 Adv. Cal. 50, 307 P. 2d 1.]

The "contrary declaration by a jury" is here merely a historical fact. It was properly set aside; after which it had no further vitality. [*Statement of the Case*, par. 6, *supra*.] The declaration which the Court of Appeals adopted was the one made by the District Judge in his findings after a trial without a jury. This declaration was made, as has been shown above, on the evidence, and on the authority of *Twentieth Century-Fox Film Corp. v. Lardner, supra*, 216 F. 2d 844, which, in turn, was based on the law, *i.e.*, the "judicial declaration," of the state of California.

Whether decision of the question of moral turpitude—assuming it to have been decided at all in the instant case—should have been made as a question of fact or of law is hardly a ground for certiorari. [Pet. 11.] The petition in that regard presents merely a request by the party defeated in the Court of Appeals for another review of the record. [See, *Magnum Import Co. v. Coty*, 262 U. S. 159, 163.] Furthermore, the question may be properly treated as one of law, *i.e.*, as one where the Court determines whether a given set of facts does or does not show moral turpitude. [*Cf., Jordan v. DeGeorge*, 341 U. S. 222; *In re McAllister*, 14 Cal. 2d 602, 604, 95 P. 2d 932, 933; *In re Rothrock*, 25 Cal. 2d 588, 589, 590, 154 P. 2d 392, 393; *Matter of Shepard*, 35 Cal. App. 492, 497, 170 Pac. 442, 444; *In re Boyd*, 48 Cal. 2d ....., 48 Adv. Cal. 88, 307 P. 2d 625.]

Third: The Court of Appeals did not hold that "a mere violation of a contempt statute involves moral tur-

pitude." [Pet. 12.] What it held was, first, that one who committed the crime defined in 2 U. S. C. A., sec. 192, acted contrary to public conventions and morals in the sense of that term as used in the contract of the parties; and, second, that, in the light of all the circumstances surrounding the commission of that crime by petitioner, he had violated his contract not to engage in that sort of conduct. That holding was based on findings of fact made by the trial court in which the Court of Appeals concurred.

Fourth: There is no connection between the instant case and the question said to be involved in *Wilson v. Loew's Inc.*, Oct. Term 1956, No. 552. [Pet. 14.] In *Wilson,* the question raised in the petition for certiorari was whether it was a denial of substantive due process for a state court not to grant relief in respect of an alleged monopolistic combination of employers which had the effect of denying employment to persons who refused to answer, on the ground of self-incrimination, questions going to their political affiliations and associations.[14] Here the question is whether petitioner's conduct—which consisted in part of a refusal to answer not based upon the ground of self-incrimination—amounted to a breach of his employment contract.

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[14]Since counsel on both sides of the instant case are also of counsel in *Wilson,* we deem it advisable to add that the foregoing statement of the question involved is not to be construed as an admission by us that the question, as we have stated it, was there actually involved or decided. It is, in our opinion however, a fair statement of the question argued in the petition in that cause.

III.

The Case Is Only an Ordinary Contract Litigation Presenting No Element of Public Importance.

In essence all that is involved here is a question of local contract law. The parties entered into an employment contract. One of them so conducted himself as to bring about the claim by the other that the contract had been breached and that consequently, discharge from the employment was justified. In the resulting litigation brought by the employee to recover damages for that discharge, it was found that the contract had been breached. In all of this there was no such principle of law involved, no such declaration of far-reaching doctrine announced, as would make of the case anything more than an ordinary contract dispute.

The federal courts came into the matter only because of their diversity jurisdiction. Had the same decision been rendered by a state court there would not have been thought to be (and there is not now) the shred of a ground upon which to base review by the Supreme Court of the United States. The federal courts which rendered the decision here were, in the circumstances, "in effect, only another court of the state . . ." [*Guaranty Trust Co. v. York*, 326 U. S. 99, 108.] The accident of diversity of citizenship does not add either importance or a federal question to the case.

Conclusion.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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